(36)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 773.

MRS. LORENA MARBRY, PETITIONER,

VS.

GEORGE W. CAIN, AND GARNISHEE, AMERICAN CENTRAL INSURANCE COMPANY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, AND BRIEF IN SUPPORT THEREOF.

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PETITION.

Petitioner prays this Court to review on writ of certiorari a judgment of the Supreme Court of Tennessee, in the case there entitled Mrs. Lorena Marbry v. George W. Cain *et al.*

A final judgment of the Supreme Court of Tennessee was rendered on February 5, 1944, when a petition for a

rehearing was denied (R. 38). The opinion of the Supreme Court was written and appears in 176 S. W. 2d, p. 813, 180 Tenn. . On August 10, 1940, Mrs. Lorena Marbry instituted a suit against defendant, George W. Cain, for compensatory and *punitive* damages in the sum of $10,000. The declaration charged negligence, recklessness and a wilful tort. There was no defense made to the declaration, and on April 18, 1941, in Book 92, page 27, judgment by default against George W. Cain was entered by the Court in accordance with the Statutory laws of Tennessee since 1794, Section 8404 which says:

> "If the defendant fails to appear and defend at the time prescribed by law judgment by default may be taken against him."

A writ of inquiry to assess the damages was issued according to the State laws of Tennessee and the jury's verdict on September 15, 1941, fixed the damages at $3,500 and judgment was pronounced by the Court (R. 11). A number of executions were issued against the defendant but nothing realized on same, and finally on May 19, 1942, George W. Cain filed a petition in the United States Bankrupt Court at Memphis scheduling and listing this judgment and he was duly adjudicated a bankrupt and finally received his discharge in bankrupt court in the Federal Court, and Cain was relieved from all of his debts save and except those provided by the Federal Statute, Section 17, and the discharge expressly and mandatorily excepted.

> "Except such debts as are by said act excepted from the operation of a discharge in bankruptcy."

In , 1943, George W. Cain, having had a fire loss and having money due him by the American Insurance Company, on September 2, 1943, execution was is-

sued and served upon this Company as garnishee levying upon the money due George W. Cain (R.). On September 13, 1943, the insurance company filed its answer as garnishee. On September 21, 1943, George W. Cain filed a motion to quash the execution levied in this cause against the funds in the hands of the insurance company, and this was amended on September 24, 1943, by what was called an amendment to the motion to quash execution but which in fact and in law was a plea of discharge by bankruptcy of the debt. On September 28, 1943, Mrs. Lorena Marbry filed her extensive demurrer to this plea of discharge claiming that the liability to Mrs. Marbry was a wilful tort and exempted from discharge (R. 21). On October 4, 1943, the trial court sustained the plea of discharge in bankruptcy of George W. Cain and the cause was appealed to the Supreme Court of Tennessee (R. 26). Assignments of error were filed in the Supreme Court of Tennessee (R. 27, 28, 29). The Supreme Court of Tennessee on January 8, 1944 (R. 31), construed the Bankruptcy Act, Section 17 (11 U. S. C. A.), and applying this federal law to the State judgment which had been rendered September 15, 1941, and which no Court, State or Federal, had any power to revise and held that said judgment, which sued for compensatory and punitive damages and the entire declaration of which was confessed as true, was dischargeable by the bankruptcy proceedings. There was no bill of exceptions to the evidence heard on September 15, 1941, and the question of whether or not this judgment rendered by default on April 18, 1941 (R. 10), and the fixing of the damages by verdict and judgment September 15, 1941 (R. 11), was dischargeable in bankruptcy depends solely and alone upon the *charges made in the declaration*, and the law applicable thereto. There is no disputable question of fact involved.

The declaration was filed August 10, 1940 (R. 3, 4, 5). Tennessee statute relating to declarations, Section 8740 of the code provides:

> "The declaration shall state the plaintiff's cause of action. It may contain several *statements* or counts. But where several distinct causes of action against the same party are joined, the court may direct separate trials of the issues."

The section of the Code of Tennessee that has been in force and effect since 1849, Section 8564, is what the pleader is presumed to have followed in this Marbry case, and the statute says:

> "All wrongs and injuries to the property and person, in which money only is demanded as damages, may be redressed by an action on the facts of the case."

It will be noted with particular care that for nearly a hundred years the legislative branch of government in Tennessee has provided in the above statute:

> "All wrongs and injuries to * * * person * * * may be redressed by *an* action on the facts of the case."

And the Supreme Court of Tennessee in *Cherry* v. *Hardin*, 4 Heisk., and in *Cotton Oil Company* v. *Shamblin*, 101 Tenn. 207, 271, construing this statute said:

> "The declaration must state *facts* which constitute the injuries complained of."

Therefore the judgment by default entered on April 18, 1941 (R. 10), and never set aside was final and beyond the power of any Court to modify *after the term* of the Circuit Court of Shelby County Tennessee *adjourned*.

For at least 108 years it has been settled in Tennessee, and also for at least 100 years by the Supreme Court of the United States that:

"It is also settled law that no Court can, in such case, change or modify its judgment of a former term, except for clerical errors. *Elliott* v. *Cochran*, 1 Cold. 389; *Sibald* v. *U. S.*, 12 Peters 488" (*Overton* v. *Biglow* 10 Yerg. 48). *State* v. *Bank of Commerce*, 96 Tenn. 598.

On September 15, 1941, the following verdict was rendered and placed on record:

"In this cause a writ of inquiry having heretofore been awarded, came the plaintiff herein by attorney and also a jury of good and lawful men towit, Ralph H. Miller, T. G. Kirkpatrick, Willis C. Meek, Edwin C. Carr, W. M. Boughton, R. B. Buckingham, R. A. Dixon, L. W. Meyers, Tom Crouch, Joe H. Schaeffer, E. H. Sullivan who were heretofore duly elected impanelled and sworn well and truly to try this cause and a true verdict render according to the law and the evidence and the jury having heard the evidence of plaintiff and witnesses and received the charge of the Court upon their oaths do say 'We the jury find for the plaintiff and assess as damages the sum of $3,-500. Ralph H. Miller, Foreman.'

It is therefore considered by the Court that plaintiff have and recover of the defendant George W. Cain the sum of Thirty-five Hundred Dollars, and all costs herein accrued for which let execution issue.

J. P. M. Hamner,
Judge.

Minute Book 92, page 162" (R. 11).

It will be carefully noted that there is not anything in this fixing of damages by the jury and approval by the Court that was not responsive to the declaration. It must be *assumed*, *implied* and *presumed* that the trial judge in charging the jury, and the jury in acting upon the facts followed the declaration which had been confessed as true on April 18, 1941, and which was *beyond the power of any*

Court to change or modify, as a term of Court had passed before the jury, and verdict for plaintiff was rendered. The statutory law of Tennessee that appears in Code of 1932, Sec. 10343, says:

> "A general verdict, although it may not in terms answer every issue joined, *is nevertheless held to embrace every issue*, unless exception is taken at the term at which the verdict is rendered."

It will be carefully noted that *no exception was taken* at the term in which verdict was rendered, and by that statutory provision it is provided that the verdict and judgment shall be:

> "Held to embrace every issue."

For more than 50 years it has been settled law by the decisions of the Courts of Tennessee as follows:

> "We understand it to be well settled that *all the* issues which might have been raised and litigated are concluded the same as if they had been directly adjudicated and included *in the judgment or decree.* [illegible] Thompson, 1 Tenn. Chy. 272; 21 Am. & Eng. Enc. of L. 236. *State* v. *Bank of Commerce*, [illegible]

[illegible] involved in this lawsuit [illegible] this final judgment upon this declara- [illegible] compensatory and punitive damages [illegible] and periods in the dec- [illegible] and as the Code, Section [illegible] which provides that "All wrongs and injuries *to* [illegible] may be redressed by *an* action on the [illegible] as was done by the pleader in this case [illegible] injuries to Mrs. Marbry. The words [illegible] in the code as to "wrongs" and "injuries" may be redressed on the facts, we must of necessity (as the

Supreme Court of Tennessee did not do), look to and discuss specifically whether or not the *wrongs* and *injuries* stated on the *facts in the declaration*, were acts of mere negligence and also *wilful torts*. In fact suit was brought for not only compensatory but for punitive damages and wilful acts so charged, and those *facts were confessed* as true by the judgment by default which was final. And we further look to the Tennessee law to see whether or not the declaration filed under Section 8564 of the Code covered or raised *an issue of wilful tort*, and we therefore turn to Tennessee law to ascertain whether or not the *facts charged in the declaration* would constitute a *wilful tort within the settled law of Tennessee*. About 60 years ago in *Railroad* v. *Guinan*, 79 Tenn. 98, the Court said:

> "*Exemplary damages* are allowed when a *wrongful act* is done with a *bad motive*, or *so recklessly* as to *imply a disregard of social obligations;* or where there is negligence so gross as to amount to positive misconduct. 1 Suth. on Dam. 723; Sedg. on Dam. 33."

The court further settled the law in this most conclusive and applicable language to the facts as charged in Declaration in this Marbry case, as follows:

> "There need not be *positive proof of malice or oppression*. If the transaction, or the *facts shown* in connection therewith, *fairly imply its existence*. Magee v. *Holland*, 3 Dutch 86."

Also in *Tel. & Tel. Co.* v. *Shaw*, 102 Tenn. 318, and *Amer. Lead Pencil Co.* v. *Davis*, 108 Tenn. 252, the law in Tennessee on *punitive* and *exemplary damages* and the *facts warranting the allowance of same*, has been crystalized in the above language. Tennessee courts reviewed this law as announced in *Day* v. *Woodworth*, 13 How. 371; *Milwaukee* v. *Arms*, 91 U. S. 493; *Scott* v. *Donald*, 165 U. S. 86, and says:

"The Supreme Court of the United States expresses the same general thought in somewhat different phraseology, not confining itself to any particular words."

The *declaration* sought:

> "Compensatory and punitive damages in the sum of ten thousand ($10,000) dollars and for cause of action says: That on or about the ... day of June, 1940, she and her husband were walking along on Looney Street in the City of Memphis, Shelby County, Tennessee, and while so using the sidewalks of said street in front of the defendant's home, George W. Cain, the defendant's minor child, started his car which was beside the house and the defendant ran and jumped into the said car and negligently, recklessly, and carelessly operated same so as to back same across the lot and before the plaintiff could get out of the way and protect herself and while she was on the sidewalk, she was run against and into by said car being operated and managed by the said defendant and the plaintiff was knocked to the sidewalk and to the gutter and said automobile ran over her, breaking various and numerous bones in her body and she was bruised and injured both internally and externally and from which injuries she was caused to be carried to the hospital and to remain there for a great length of time and has suffered great physical pain and mental anguish and came near dying and is seriously and permanently injured."

It will be noted that the above declaration charged negligence and carelessness, and recklessness, then it had complete sentences charging facts and punctuations of periods, and there was charged *three* specific charges of *recklessness* on the part of George W. Cain:

> "1. That he recklessly left the key in his car by which his minor children, who were permitted to play in same, might turn on the ignition and start said car;

2. That he recklessly permitted his children to be in said car while the key was in same and while it was subject to be started by merely using the mechanical devices to start same;

3. And then *charged a wilful tort in this language*: 'That when his said minor child did start said mechanical devices in said car so as to start said car, the defendant negligently, carelessly and *recklessly, after getting into said car* and *getting hold of the steering wheel, he managed, operated and directed* said car *so as to run same over the plaintiff who was using the sidewalk* and public thoroughfare and *while she was guilty of no negligence* whatsoever and causing her to be injured as hereinabove described' " (R. 3. 4, 5).

Therefore this was such *wilful, reckless* or *heedless* conduct on the part of George W. Cain as to amount to:

"Wilful and malicious injuries to the person of another,"

as defined in Section 17 of the Bankrupt Law, and therefore was not dischargeable under the Bankrupt Law (R. 27).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The final judgment that Mrs. Lorena Marbry recovered against George W. Cain in 1941, though scheduled in George W. Cain's bankruptcy proceedings, it was not dischargeable under Section 17 of the Bankrupt Act because it was for wilful tort, and the Tennessee Supreme Court erroneously construed this federal act and erroneously applied this federal act to the judgment owned and possessed by Mrs. Marbry, and the Supreme Court of Tennessee's decision on this federal question involved a fed-

eral question of substance and since a federal right is involved and the declaration which was confessed and on which recovery was awarded, stated facts of a wilful tort committed by George W. Cain in this language:

> "The defendant (George W. Cain) negligently, carelessly, and recklessly, after getting into said car, and *getting hold of the steering wheel*, he *managed, operated*, and *directed* said car *so as to run same over the plaintiff* who was using the sidewalk and public thoroughfare and while she was guilty of no negligence whatsoever and causing her to be injured as hereinabove described" (R. .....).

Webster's New International dictionary, page 631, Section 4 defines for the last hundred years the word "Direct" to mean:

> "To arrange in a direct or straight line, as against a mark or towards a goal; to point; to aim; as to direct an arrow or a piece of ordnance."

Therefore the common acceptation, that has been defined by the lexicographers of the English language for the last hundred years or more the phrase or clause stating facts that George W. Cain:

> "After getting into said car and *getting hold of the steering wheel* he managed, operated, and *directed said car so as to run same over the plaintiff* who was using the sidewalk and public thoroughfare, and while she was guilty of no negligence whatsoever" (R. .....).

This is in effect an interpretation of the English language settled for a hundred years that "he pointed or aimed the car, just like he would an arrow or a piece of ordnance," "*so as to run over plaintiff*"; and it was not in the power of the Tennessee court to whittle away or decrease

or diminish the meaning of the *charge of facts in the declaration that was confessed as true after some* 16 *terms of the Court had ended* since the judgment was entered and made final. And the erroneous application of the Federal Law, Section 17, of the Bankrupt Act was not correctly or lawfully applied by the Tennessee Courts to this judgment of Mrs. Marbry's, and Tennessee courts deprived Mrs. Marbry of their Federal right that exempted a wilful tort from discharge by Bankruptcy. And these questions were expressly raised by assignment of error before the Supreme Court of Tennessee (R. 27), as well as pointed out in the demurrer raising these federal questions at the threshold of this litigation (R. 21).

JURISDICTION OF THIS COURT.

Jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937, 28 U. S. C. A. 344 (*Pittman* v *Home Owners Loan Corp.*, 308 U. S. 21; *Miles* v. *I. C. R. R.*, 315 U. S. 722), authorizing petitions for writs of certiorari to be prayed for and issued to higher courts of various states where "a title, *right*, privilege or immunity is set forth or claimed under a statute of United States." In this case, a *privilege*, *right*, and *an immunity* was set forth in the demurrer before the trial court, and in assignments of error before the Supreme Court of Tennessee all of which were erronously overruled by the Tennessee courts. In the erroneous application of this final judgment to the Federal law; and the construction placed upon the Federal law by the courts of Tennessee was erroneous in applying same to this *federal right.* The Supreme Court of Tennessee is the "highest court of that state" as set forth in Article VI, Section 1, of the Constitution of Tennessee of 1870.

SPECIFICATIONS OF ERRORS ON THE QUESTIONS PRESENTED BY THE RECORD.

In Article I, Section 8, Subsection 5 of the Constitution of the United States Congress was given power to enact:

> "Uniform Laws on the subject of Bankruptcies throughout the United States."

By Article VI of the Constitution it is provided:

> "This Constitution, and the Laws of the United States which shall be made, in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The judgment rendered in favor of Mrs. Marbry against Cain and which was three years old and after more than 16 terms of the Court had passed, and it not being in the *power of any Court*, State or Federal, to *revise or modify said judgment*, the bankrupt law passed by Congress Section 17 *expressly exempted or excepted from discharge in bankruptcy "wilful and malicious injuries to person"* and this right existing by expressed federal law, the Tennessee court could not deprive Mrs. Marbry of *this federal right*. The declaration in the State Court charged that George W. Cain:

> "After getting into said car and getting hold of the steering wheel he managed, operated and *directed said car so as to run same over the plaintiff* who was using the sidewalk" (R. 5).

This being confessed as true four years ago and after 16 terms of the Court had passed it was not in the power or authority of Tennessee courts to *revise or modify*

said judgment based upon said pleadings, and which was an *expressed* or an *implied intentional wrong*. Tennessee law as defined in *Draper* v. *State*, 4 Bax. 246; *Bryan* v. *State*, 7 Bax. 67; *Wright* v. *State*, 8 Lea 567, on the *law of intent* the Court held:

> "Every person is intended to presume the usual and natural consequences of his act."

And in *Clark* v. *State*, 131 Tenn. 372, 144 S. W. 1137, the Court said of a trespass:

> "The trespass is wilful when there is *heedless disregard* for the *rights of others*."

And in *Union Casualty Co.* v. *Harold*, 98 Tenn. 593, 596, speaking of *intent* the Court said:

> "A *voluntary act* is an intentional one. One which the actor of his own will, with the *power of choice*, determined to do or perform."

In the leading case of *Allen* v. *U. S.* (which was 3 times before the Supreme Court of the United States), 164 U. S. 495 announcing the law relative to *intent* said:

> "The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it."

Then the Court further said that *intent could be inferred*:

> "From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the

> blow was intended prior to the striking, although at a period of time inappreciably distant."

Therefore the *intent* of George W. Cain to wilfully and maliciously, or at least recklessly, run over Mrs. Marbry is *expressly* or at *least impliedly stated* when we read the confessed charges:

> "After he got hold of the steering wheel (the instrumentality by which *the direction of the car is controlled*) he managed, operated, and *directed said car so as to run same over the plaintiff* who was using the sidewalk."

The Supreme Court of Tennessee, we think, committed inexcusable error in this case (176 S. W. 2d 815), when Justice Prewitt said:

> "We are unable to see how any inference or conclusion of malicious and willful conduct could result from some person rushing to his automobile that had been started by his small child and *undertaking to stop the automobile which ran into an innocent person.* All of the elements of willful and malicious conduct are lacking."

The language which we have italicized, "And undertaking to stop the automobile which had run into an innocent person," *does not appear in the record*, and the Supreme Court of Tennessee, through Justice Prewitt, has by guess, surmise, suspicion and conjecture and which contradicts, changes, revises and modifies after 3 years or 16 terms of trial court has ended, the language of the pleading confessed as true, done that which the Supreme Court of the United States, and the Supreme Court of Tennessee, in other cases, have expressly held could not be done, because the courts have been uniform in saying:

> "No verdict (or judgment) can stand on conjecture." *Chicago, etc., R. R.* v. *Coogan*, 271 U. S. 472; *Buckeye Cotton Oil Company* v. *Campagna*, 146 Tenn. 389.

A great federal judge, Ray, in *U. S.* v. *Green*, 136 Fed. 618, c. d. 190 U. S. 601, expressly held:

> "Suspicion, guess, surmise, conjecture, and speculation with some evidence as a basis, do not establish a fact in the eyes of the law."

The Tennessee Supreme Court's error in making this statement, *that is not sustained in the record,* is in the *teeth of the facts stated in the record,* and is just opposite and just the reverse, because the record says:

> "After getting into said car and getting hold of the steering wheel he managed, operated, and directed said car so as to run same over the plaintiff who was using the sidewalk."

The action of the Supreme Court of Tennessee in deciding on this federal right of exemption of Mrs. Marbry's claim under Section 17 of the Bankrupt Act, and a *controlling fact by that Court in the opinion,* on a factual question, that *was not in the record,* is, indeed, a novel way *"to screen or deprive a citizen of a federal right."* If conjecture, guess, surmise or speculation was to be indulged in by the Supreme Court of Tennessee in dealing with this federal right, why did the Court not guess (1) *"why Cain did not switch off the ignition,"* (2) *"cut off the power,"* (3) *"apply the foot brakes,"* or (4) *"the emergency brake,"* and (5) above all *"why Cain did not after he got control of the instrumentality that directed and controlled the car,* why did he not" *direct (point* and *aim) the car so as to avoid striking and running over Mrs. Marbry who was using the sidewalk.* This Court has wisely and fundamentally said, and we ask application:

"This court may not ignore minor violations of constitutional rights." *Patton* v. *U. S.*, 281 U. S. 276.

The Supreme Court of Tennessee in dealing with Mrs. Marbry's right of exemption under Section 17 of the Bankrupt Law in 176 S. W. 2d 815, further said:

> "There is nothing in the declaration indicating any act or acts done by the defendant showing a bad motive, there is nothing to indicate any ill will or malice towards the plaintiff, and there is no act by which she could presume that the thing done was intentional or that the doer should have had a consciousness of the probable result of his unlawful act."

The *first clause* of the above statement of the Supreme Court of Tennessee, is in our opinion, absolutely and expressly contradicted by the *declaration itself*. And that Court had no power to *revise* or *modify*, in the least, as 16 terms or 3 years had passed since the entry of this judgment by the trial court and from which there was no appeal. To the clause:

> "There is nothing to indicate any ill will or malice towards the plaintiff,"

and *this burden placed upon this federal right* by the Supreme Court of Tennessee is absolutely in the *teeth of and contrary to the federal act as construed by the Supreme Court of the United States*, in *McIntyre* v. *Kavanaugh*, 242 U. S. 138, in which there was urged that *special malice* as indicated was necessary by the Supreme Court of Tennessee and in which it said:

> "There is nothing to indicate any ill will or malice."

And this Court in *McIntyre* v. *Kavanaugh*, 242 U. S. 138, said that *special malice need not be proven*:

> "In order to come within that meaning as a judgment for a wilful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained. A wilful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done wilfully and maliciously, so as to come within the exception."

To the *third determinative clause* by the Supreme Court of Tennessee in its opinion,

> "There is no act by which she could presume that the thing done was intentional or that the doer should have had a consciousness of the probable result of his unlawful act."

We think that the language of the declaration, confessed as true and charged:

> "The defendant * * * recklessly after getting into said car and getting hold of the steering wheel he managed, operated, and directed said car so as to run same over the plaintiff who was using the sidewalk."

And *it could have been implied* for *it is expressly stated* that he *intended the natural result of his acts* when he *pointed or aimed* the car when he had *"control of the steering wheel" by which the car was aimed, pointed and directed,* and he *"directed it so as to run over the plaintiff,"* who was using the sidewalk, and certainly under our State and Federal decisions the *wilful intent could be presumed or implied* from this *charge of facts* that *were confessed as true.* The Supreme Court of Tennessee in this case, 176 S. W. 2d 815, 1st Col., stated:

> "It is insisted on behalf of the plaintiff that, judgment by default having been taken against the defend-

> ant Cain in the automobile suit, all of the averments and allegations of the declaration must be taken as true. While the declaration contends for compensatory and exemplary damages, the verdict of the jury was general, and it will not be presumed that the jury found the defendant guilty of 'wilful and malicious conduct.' *Fleshman* v. *Trolinger*, 18 Tenn. App. 208, 74 S. W. 2d 1069."

The Fleshman case *did not hold as stated by the Supreme Court of Tennessee*, and the *reason* that Faw, J., gave in that case as why Trolinger *could not be held responsible for a wilful tort* and that the *wilful tort could not be implied*, is:

> "Neither the evidence heard by the jury nor the charge of the court to the jury are in the record, and we cannot assume that the jury found that defendant James T. Trolinger was *in the automobile at the time* it injured Mrs. Garvin, when there is no averment *to that effect in the declaration.* For *this reason*, we do not think that the declaration contains an averment that defendant James T. Trolinger *willfully* (that is, intentionally) *drove the car upon and against Mrs. Garvin. Tippett* v. *Sylvester*, (N. J. Sup.) 127 Atl. 321." 18 Tenn. App. 218.

And Section 10343 of the Code of Tennessee, that has been in force since 1851, or 93 years provided just to the contrary in this language:

> "A general verdict, although it may not in terms answer every issue joined, *is nevertheless held to embrace every issue*, unless *exception* is taken *at the term at which the verdict is rendered.*"

Justice Prewitt did not attempt to hold this 93 year old statute void but by using the language that he did he deprived Mrs. Marbry of this federal right by stating a law different from that that has existed in Tennessee for

93 years, and when, by all of the Tennessee and Federal court authorities, he had no power or authority to *revise or modify* the judgment that was entered 16 terms or 3 years before his decision. Why did not the Supreme Court of Tennessee apply to Mrs. Marbry's case the law that had been announced and applied by it in other cases for the last 75 years?

> "We understand it to be well settled that *all the issues* which *might* have been raised and litigated are concluded, *the same as if* they had been directly adjudicated, *and included in the judgment or decree.*" *Lindsley* v. *Thompson*, 1 Tenn. Chy. 272; 21 Am. & Eng. Enc. of L. 216." *State* v. *Bank of Commerce*, 96 Tenn. 592.

Thus, the Supreme Court of Tennessee failed to apply the statutory law and former decisions, and discriminated against Mrs. Marbry on this Federal right. Since in this judgment Mrs. Marbry possessed a federal right under Section 17 of the Bankrupt Law which exempts her judgment as founded on a *wilful tort* this Court has said:

> "No State court can screen denial of or discriminate against a federal right under the guise of enforcing its local law." *Davis* v. *Westchester*, 263 U. S. 22.
>
> "A State may not discriminate against rights arising under federal law." *McKnett* v. *S. L. & S. F. R. Co.*, 292 U. S. 234.
>
> *Miles* v. *I. C. R. Co.*, 315 U. S. 722.

In the *first reports* of Tennessee, *State* v. *Council*, 1 Over. 305, 306, the Court speaking of *intent* said:

> "When the act is in itself illegal, the *law presumes evil intentions.*"

In a later case of *West* v. *State*, 9 Hump. 670, the Court speaking of intent said:

> "The intent, if necessary to be proven, may and generally *must be inferred from the acts of the party* and the *circumstances attending the case;* and as men seldom do unlawful acts with innocent intentions, the law presumes every act, in itself unlawful, to have been criminally intended."

And in the case of *Lauterbach* v. *State*, 132 Tenn. 603, 605, in an opinion by Chief Justice Neil holding Lauterbach guilty of a felonious homicide while operating an automobile and violating the speed law of 20 miles per hour in a reckless disregard of the rights of other cited and followed Connecticut cases and said:

> "One who disobeys the statutory rule as to speed is acting in defiance of law, and *must be held to have anticipated* the possibility of *any injury* caused by *his recklessness.*"

Then applying the facts confessed as true in the declaration that Cain:

> "After he got hold of the steering wheel (the *instrumentality by which said car is aimed, and directed*) he managed, operated and *directed* said car so as to run same over the plaintiff who was using the sidewalk."

The eyes of the Supreme Court of Tennessee were, we think, covered to such extent by cataracts of human error that the Court discriminated in the application of Tennessee law, against Mrs. Marbry, which law had been applied as settled law in numerous other cases, and deprived Mrs. Marbry of her property and property rights by not correctly applying the *facts charged in the declaration and confessed as true*, and in not correctly applying the Supreme Court of the United States' *construction of this federal statute*, Section 17 of the Bankrupt Act, exempting from discharge wilful torts.

REASONS RELIED ON FOR GRANTING THE WRIT.

It is submitted that this Court should entertain jurisdiction for the reasons:

(a) The question is of importance as evidenced by numerous reported decisions in the Federal and State courts, bearing more or less upon the questions involved.

(b) The case involves a Federal question of substance and the application or construction of Section 17 of the Bankrupt Act, and we think that the Supreme Court of Tennessee has misconstrued this federal statute and has not correctly applied the federal statute as construed and applied by this Court, whose construction has been settled and is final in the case of *McIntyre* v. *Kavanaugh*, 242 U. S. 138.

(c) Since under Tennessee law both statutory and decisions Mrs. Marbry's judgment was final and 3 years or 16 terms had passed and it was not in the power of Tennessee court to then *revise or modify* said judgment, and since a federal right is involved, "No State Court can screen denial of or discriminate against a federal right under the guise of enforcing its local law (or its idea of local law)." *Davis* v. *Westchester*, 263 U. S. 22; *McKnett* v. *S. L. & S. F. R. Co.*, 292 U. S. 236; *Miles* v. *I. C. R. R. Co.*, 315 U. S. 722.

(d) And as the Supreme Court of Tennessee has directed its opinion to be published in 180 Tenn. ....., 176 S. W. 2d 813, this will not only deprive, if permitted to stand, Mrs. Marbry of her *exemption from discharge in bankruptcy her judgment of $3,500*, but will in fact and in law be a flag of misconception and misconstruction of the federal law. Federal law is the same in every parallel of latitude and every meridian of longitude throughout the United States.

(e) Article IV, Section 2, of the Constitution, provides:

> "The citizens of each State shall be entitled to all privileges and immunities of the citizens in several States."

And the acts on the part of the Tennessee Court deprives Mrs. Marbry of her rights under this federal law to have said judgment *exempted under Section 17.*

(f) In Amend. 14 to the Constitution, it is provided:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall any State deprive any person of property without due process of law; nor deny any person within its jurisdiction the equal protection of the Law."

We think and urge that Tennessee Courts have deprived Mrs. Marbry of her property without "due process of law," because it has in effect *revised* and *modified* a judgment which was 3 years old and where 16 terms of the Court had passed and when it was not in the *power* of said Courts to *modify* or *revise* said judgment. And compensatory and *punitive damages* were sued for, confessed and recovered, and *implies wilful tort.*

Your petitioner presents herewith as part of this petition a certified copy of the transcript of the record of the Supreme Court of Tennessee and presents its brief for consideration with this petition discussing the questions involved. Wherefore your petitioner prays that a writ of certiorari be issued out of and under the Seal of this Court directed to the Supreme Court of Tennessee commanding said Court to certify and send to this Court on a day certain and therein designated a full and complete transcript of record in said Court styled, Mrs. Lorena

Marbry vs. George W. Cain *et al.*, to the end that said case may be reviewed and determined by this Court, and the petitioner may have such relief as this Court may deem proper, lawful and equitable, and that the opinion and judgment of the Tennessee Courts be reversed and this Court hold and decide, as those courts should have held, that the judgment awarded Mrs. Marbry against George W. Cain in 1941, as reflected by the record, be held to be *exempted from discharge in bankruptcy under Section 17* of the Bankrupt Act, as a wilful tort and which is not only exempted under said law, but by the Act of Congress, Bankrupt Court has no jurisdiction over wilful torts to discharge same.

Mrs. Lorena Marbry,
By WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Mrs. Lorena Marbry.